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CHARLES ELMORE CROPLEY
CLERK

No. 334

**In the
Supreme Court of the United States**

OCTOBER TERM, 1943

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMERICAN TUBE BENDING CO., INC.

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI**

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The Respondent prays that the petition for a writ of certiorari in the above entitled case be denied.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 83-86) is reported in 134 F (2d) 993. The findings of fact, conclusions of law, and order of the Board (R. 57-80) are reported in 44 N. L. R. B. 121.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 7, 1943 (R. 90). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

REASONS FOR DENYING THE WRIT

1. The Respondent respectfully submits that the decision in the instant case is governed by the decision of this Court in *National Labor Relations Board v. Virginia Electric & Power Company*, 314 U. S. 469, and that the Circuit Court of Appeals for the Second Circuit properly so decided in its unanimous opinion.

In the instant case, as in the *Virginia Electric* case, the speech and letter complained of set forth the right of the employees to do as they please without fear of retaliation by the company. The facts in this case are indeed stronger in that there are no surrounding circumstances upon which the Board could rely to raise the utterances to the stature of coercion whereas in the *Virginia Electric* case, there was a complex of activities including an anti-union background of the company, warnings of possible discharges, one actual discharge and participation in the quick formation of an independent union upon all of which the Board might have relied. There were no other activities whatsoever in the instant case.

It is to be noted that the entire record before the Board was stipulated (R. 1), and all of it is now before this Court. The Board in its decision based its finding of unfair labor practices on the utterances of respondent's president (R. 62-70). There was no other evidence upon which the Board could base a finding of coercion.

Since there are no surrounding circumstances upon which the Board might rely to sustain a finding of coercion, it now seeks to supply the deficiency by lifting parts of the utterances themselves from their context and by applying an interpretation of the *Virginia Electric* decision which, it is submitted, is entirely foreign to that decision. Thus, on page 8 of its petition for a writ of certiorari, the Board interprets the *Virginia Electric* decision as not requiring that there be evidence of other coercive circumstances, but only that it sustain its conclusion of coercion by including in its finding the reasons and process of expert judgment by which it analyzed the utterances and arrived at its conclusion. That interpretation is in absolute conflict with the language of this Court. This Court in the *Virginia Electric* case said (314 U. S. at 479) :

"Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination, *without reference to the bulletin and the speeches*, or whether the whole course of conduct, evidenced in *part* by the utterances, was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence." (Italics added.)

There is nothing in the decision which permits the Board thus to support a finding of coercion by its own expert analysis.

2. There is not one scintilla of evidence in the entire record from which a reasonable man could find the slightest restraint or coercion, or a violation of the National Labor Relations Act. The moderate utterances of the respondent are within the protection of the First Amendment to the Constitution of the United States. See *National Labor Relations Board v. Virginia Electric & Power Company*, 314 U. S. at 477.

3. As the petitioner indicates in its petition on page 15, there appears to be no conflicting decision of the several Circuit Courts of Appeal, other decisions all involving findings based on evidence of coercion apart from the employer's utterances.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

AMERICAN TUBE BENDING COMPANY, INC.,

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October, 1943.

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